In view of this holding, the California case of Albert Pick Company v. Jordan[7] may no longer represent the law in this state.

*E. M. C.*

EVIDENCE: JUDICIAL NOTICE.—In the case of *Varcoe v. Lee et al*,[1] an action for personal injury from collision with an automobile, the plaintiff recovered a verdict. The judgment is reversed on the sole ground that the judge told the jury the place where the accident occurred was a business district as defined by the State Motor Vehicle Act. The delay and the expense of a new trial in a jury case is a serious matter. Unless there has been a miscarriage of justice the judgment should be affirmed.[2] Does such miscarriage appear in this case? Clearly not. For all the opinion shows, there was absolutely no dispute as to whether the place was a business district. How then could it be error to charge the jury that it was such? The opinion does not say that the court is limited by section 1875 of the Code of Civil Procedure as to the matters of which judicial notice may be taken. That section is poorly worded, omitting as it does matters of common notoriety. But here as elsewhere in the code the courts have construed the narrow code provisions as not exclusive of the common law.[3] Accordingly judicial notice has been taken of many matters of common notoriety,[4] and if the character of the place as a business district were known to everybody, what an absurdity to say that the jury should pretend to be ignorant of it! But if the place is as an undisputed fact a business district who knows that fact so well as the local judge or jury?[5] How can the Appellate Court reverse the trial judge except by taking judicial notice itself that the character of the place as a business district could be disputed, in other words by doing exactly what it has said the trial court should not do. To borrow Chamberlayne's terminology, is it not the true function of judicial administration to give the trial court a large power in taking judicial notice and should it not be necessary for the party alleging error to offer sufficient evidence to show that the matter is a disputable one that should be left to the jury? It is a question of the burden of proof.[6] Were this sensible procedure followed trials would be greatly shortened by the elimination of matters on which there is not dispute and new trials would not be necessary unless the appellant showed actual prejudice from the record.[7]

*A. M. K.*

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[7] Supra, n. 4.

[1] (May 13, 1918), 26 Cal. App. Dec. 987.

[2] Cal. Const. Art. VI, Sec. 4½.

[3] People v. Mayes (1896), 113 Cal. 618, 625, 45 Pac. 860 (dictum).

[4] 3 California Law Review, 238.

[5] Considerable diversity exists in the precedents. Chamberlayne, The Modern Law of Evidence, § 746; Wigmore, Evidence, § 2580.

[6] Chamberlayne, § 700.

[7] "Taking judicial notice does not import that the matter is indisputable.

EQUITY: ENFORCEMENT OF NEGATIVE COVENANTS.—In *Andersan v. Neal Institutes Company et al*[1] the defendant company operating through the United States gave plaintiff the exclusive right for 99 years in Northern California to advertise, receive and use in business, its remedies and treatment for the excessive use of alcohol and drugs. The plaintiff built up a large business in San Francisco, then the defendant company ceased to supply him with its remedies and in conjunction with the other defendants maintained a rival institute in San Francisco. The case is clearly one where damages are inadequate, yet specific relief will not be granted. It thus resembles the case of the opera singer and baseball player, although the grounds are not entirely the same. The interest of personal liberty and the practical impossibility of compelling satisfactory service prevents specific performance in the opera singer and baseball player cases. These grounds are not present in the principal case, but there is a real difficulty of supervising performance. The result is that a person building up a business which is dependent on a contract with another for continuous work and performance must take a chance on having that business destroyed by a breach of contract, with damages the only compensation for the destruction. The rule is so well established that the plaintiff in the principal case made no attempt to get specific performance, but did try to bring indirect coercion on the defendants by preventing them from maintaining the rival business in San Francisco.[2] This procedure was sanctioned in the leading case of Lumley v. Wagner,[3] and that decision has ever since been the subject of heated controversy. Where Lumley v. Wagner is followed[4] the doctrine is usually qualified by two

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It is not necessarily anything more than a prima facie recognition, leaving the matter still open to controversy. . . . . Courts may judicially notice much which they cannot be required to notice. That is well worth emphasizing, for it points to a great possible usefulness in this doctrine, in helping to shorten and simplify trials; it is an instrument of great capacity in the hands of a competent judge; and is not nearly as much used, in the region of practice and evidence, as it should be." Thayer, A Preliminary Treatise on Evidence, p. 308. It should be noted that § 2102 of the Code of Civil Procedure is not necessarily a bar to this administrative function. If the matter is properly one for judicial notice the judge should declare it to the jury and the jury must follow the judge's instructions. When the judge takes judicial notice of a fact as one of general notoriety his instructions should be conclusive in the absence of evidence in the record.

[1] (May 8, 1918), 26 Cal. App. Dec. 931.

[2] Barry Gilbert, Enforcement of Negative Covenants, 4 California Law Review, 114, 127.

[3] (1852), 1 DeG. M. & G. 604, 50 Eng. Ch. Rep. 466.

[4] See 8 Harvard Law Review, 172, quotations from Mr. Justice Holmes refusing to bow to the authority of Lumley v. Wagner. When the case came before the entire bench, it was distinguished from Lumley v. Wagner without expressly refusing to follow its authority. Rice v. D'Arville (1895), 162 Mass. 559, 39 N. E. 180.